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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff and Respondent,

v.

GOLDEN GATE PETROLEUM, CO. ET  
AL.,

Defendants and Appellants.

A151075

(Contra Costa County  
Super. Ct. No. MSC07-02593)

Golden Gate Petroleum Co., Bay Area/Diablo Petroleum Company, Dennis O’Keefe, and Westgate Petroleum Company, Inc. (collectively, the Golden Gate Parties) appeal from an order imposing \$3 million in penalties for violating the terms of a consent judgment. They contend: (1) respondent failed to comply with the notice requirements for enforcing the consent judgment; (2) the court did not make a valid finding of any violation of the consent judgment; and (3) O’Keefe should not be held personally responsible for the penalties. We will affirm the order.

**I. FACTS AND PROCEDURAL HISTORY**

**A. Complaint**

Respondent People of the State of California (People) filed a complaint against the Golden Gate Parties in November 2007, alleging 50 or more types of environmental protection violations at the underground storage tank (UST) facilities that the Golden

Gate Parties owned and operated. The Golden Gate Parties were potentially subject to over \$50 million in civil penalties.

B. Amended Final Judgment on Consent

On July 29, 2011, the Golden Gate Parties and the People entered into a Stipulation for Entry of Final Judgment on Consent. Based on that stipulation, the trial court entered a Final Judgment on Consent on August 8, 2011. On November 23, 2011, the court entered the operative Amended Final Judgment on Consent (AFJC).

As relevant here, the AFJC contains three elements: (1) an injunction requiring the Golden Gate Parties' future compliance with laws regarding UST systems at their facilities; (2) payment by the Golden Gate Parties of \$6 million in civil penalties and costs, with \$3 million of that amount suspended; and (3) a procedure for compelling payment of the suspended penalties if the Golden Gate Parties violated the terms of the AFJC. We discuss each of these elements in further detail.

1. Preliminary Injunction Requiring Compliance

The AFJC requires the Golden Gate Parties to (1) comply with chapters 6.5 (hazardous waste), 6.7 (underground storage tank systems), and 6.95 (hazardous materials) of Division 20 of the Health and Safety Code, and the regulations promulgated thereunder; (2) comply with 43 injunctive provisions related to the operation of the UST systems at the facilities owned and operated by the Golden Gate Parties; and (3) maintain a position of "Environmental Coordinator" to manage the Golden Gate Parties' compliance with the injunctive terms of the AFJC. The Environmental Coordinator's duties include collecting and maintaining copies of all written advisements of violations – including notices of violations and inspection reports issued by local regulatory agencies – and providing to the People annual status reports that set forth the Golden Gate Parties' program for compliance.

2. Monetary Liability

Section C of the AFJC imposes joint and several liability on each of the Golden Gate Parties for \$6 million in civil penalties and costs. Of that amount, \$3 million was

suspended, conditioned on the Golden Gate Parties' compliance with the terms of the AFJC for five years.

### 3. Suspended Penalty Amounts for Violations

Section C.3.1 provides for payment of a specified suspended penalty if any of the Golden Gate Parties violate an injunctive requirement of the AFJC. A base penalty is assessed for the first day of each violation and, if the violation is not corrected within the time prescribed by the AFJC, additional penalties are assessed for each day after the corrective period that the violation remains uncorrected. The amount of the penalty depends on the type of violation and its threat to public safety or the environment.<sup>1</sup>

Section C.3.1(a) of the AFJC provides that, if the People “determine that Defendants have violated one or more injunctive provisions, the People shall notify Defendants of the violation and request payment of a Suspended Penalty.”

Within 30 days after the People's notice under section C.3.1(a), the Golden Gate Parties are required under section C.3.2 to pay the suspended penalty. If the Golden Gate Parties do not pay, asserting that the alleged violation did not occur or that they are not responsible for it due to a force majeure, section C.3.1(b) allows the People to “file a noticed motion as set forth in Section H, requesting that the Court impose Suspended Penalties.” Section H in turn provides: “The People may move [the superior court] to enforce any provision of this Judgment and to award other appropriate relief, including penalties for contempt and penalties as provided for in Section C.3, by serving and filing a regularly noticed motion in accordance with Code of Civil Procedure section 1005 (‘Enforcement Motion’).” (Here, the People elected to pursue suspended penalties under

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<sup>1</sup> The AFJC set forth three categories of violations: (1) in sections F.2.1-2.11, violations that could directly impact the environment, such as failure to maintain secondary containment, which carries a penalty of \$2,500 for the first day of violation and \$2,500 for each day of violation after a 30-day corrective period; (2) in sections F.2.12–2.33, medium threat violations such as the failure to notify a local agency in advance of upgrades to UST systems, which carries a penalty of \$1,000 for the first day and \$1,000 for each day after a 30-day corrective period; and (3) in sections F.2.34–2.44, lowest threat violations such as inadequate recordkeeping, with a penalty of \$500 for the first day and \$500 per day after a 30-day corrective period.

section C.3 rather than contempt.) At least 10 days before filing such a motion, the People must seek to meet and confer in good faith with the defendants to attempt to resolve the matter without judicial intervention.

Section C.3.1(c) identifies what is required for the court to impose suspended penalties: “If the Court finds that one or more Defendants have engaged in a violation on one or more occasions, for each day of each violation, the Court shall require Defendants to pay a Suspended Penalty as described in Section 3.1(a).” Section C.3.1(c) further provides: “The Parties will not be permitted to request the Court to reduce, increase, or otherwise modify the amount of the Suspended Penalty. Suspended Penalties may be imposed until the entire Suspended Penalty of three million dollars (\$3,000,000.00) is exhausted.”

Under section K of the AFJC, “[a]ll submissions and notices required by this Judgment shall be sent to” Dennis O’Keefe of Bay Area/Diablo Petroleum Company and Pollock & James LLP, attorneys for the Golden Gate Parties.

#### C. The Golden Gate Parties’ Violations of the AFJC

After entry of the AFJC, local agencies continued their normal inspection and regulatory oversight of the Golden Gate Parties’ facilities. In 2011–2016, the agencies identified numerous post-judgment violations of law that they documented and reported to the Golden Gate Parties pursuant to their standard procedures.

On July 14, 2016, the People (by Deputy Attorney General Brett J. Morris) notified the Golden Gate Parties of potential violations of the AFJC by letter to Dennis O’Keefe and attorney Mark Pollock. The letter advised that the People had received information of additional code violations at the Golden Gate Parties’ facilities that “may be considered a failure to comply with the injunctive provisions” of the AFJC. The letter requested that the Golden Gate Parties “meet and confer with the People to attempt to resolve these various violations and to discuss the payment of the appropriate Suspended Penalty.” An initial meet-and-confer meeting was held on July 21, 2016.

On September 21, 2016, Deputy District Attorney Robert Nichols sent an email to counsel for the Golden Gate Parties, which included a violations chart identifying the

instances of non-compliance and the penalties sought. The parties continued to meet and confer, but the Golden Gate Parties did not pay.

#### 1. People's Motion for Suspended Penalties

On December 29, 2016, pursuant to Section H of the AFJC, the People filed a motion under Code of Civil Procedure section 1005 for the imposition of the suspended penalties. In support of the motion, the People submitted evidence of violations justifying the assessment of penalties in excess of \$10 million, including declarations of inspectors from local regulatory agencies who visited the Golden Gate Parties' facilities and observed the violations, as well as inspection reports and notices of violations issued by the local regulators to each facility. Between February 2012 and December 2016, the Golden Gate Parties had committed thousands of violations at ten facilities they owned and operated, including failures to maintain a monitoring program, a compliant secondary containment system, a spill containment structure and overfill prevention system, operational sensors to stop product flow, proper storage of spent absorbent materials, and adequate records. Many of the violations, even after being brought to the Golden Gate Parties' attention by the local inspectors, remained uncorrected. The violations of the UST, hazardous waste, and hazardous materials laws also constituted violations of the AFJC.

#### 2. Golden Gate Parties' Response

The Golden Gate Parties opposed the People's motion, contending that (1) the People were barred from seeking suspended penalties because the local agency's notices of the Golden Gate Parties' code and regulatory violations had not been sent to the Golden Gate Parties' attorney (Pollock); and (2) the Golden Gate Parties were entitled to an evidentiary hearing using a contempt standard, including the opportunity to cross-examine and call witnesses.

In their opposition, the Golden Gate Parties submitted the declaration of their Environmental Compliance Manager, Michael O'Keefe. The court struck O'Keefe's declaration testimony, based on the People's objections that it contained only conclusory denials that the violations occurred and objections to the People's evidence, without any

evidentiary facts to rebut the People's evidence. The Golden Gate Parties do not challenge this ruling.

The Golden Gate Parties also submitted a declaration from attorney Pollock. The court sustained some of the People's objections to Pollock's declaration, in rulings not challenged in this appeal. Other aspects of Pollock's declaration included his assertion that, when drafting the "Consent Judgment" in 2011, "the primary goal, in [his] mind and articulated by the prosecutors, was achieving future compliance with the underground storage tank laws and regulations on the part of Golden Gate Petroleum." Pollock averred that to achieve future compliance, he inserted into the consent judgment the requirement that Golden Gate Petroleum employ an Environmental Coordinator, the provision in section C.3.1(a) requiring the People "to 'notify Defendants' of any new violations of the injunctive provisions of the Consent Judgment," and the language that all notices to defendants under the consent judgment must be sent to Pollock & James so Pollock "could personally monitor future compliance with the terms of the Consent Judgment." Pollock does not aver that his intention to "personally monitor future compliance" was expressed to the People (or even shared with the Golden Gate Parties). Pollock avers that at no time between the November 2011 AFJC and the People's July 2016 correspondence did anyone notify his law firm of a notice of violation that could warrant a suspended penalty under the AFJC.

### 3. Trial Court Imposition of Suspended Penalties

On March 13, 2017, the court entered an order requiring the Golden Gate Parties to pay the full \$3 million of suspended penalties under the AFJC.<sup>2</sup> The court observed the Golden Gate Parties' failure to rebut the People's evidence or to provide "any independent basis to conclude the alleged violations did not occur." The court found that the Golden Gate Parties had been given "the usual, routine notice" of violations as they were discovered by the local regulatory agencies, and that the People had complied with the notice provisions of the AFJC. It further noted that, even if the People had not complied with the AFJC's notice terms, the Golden Gate Parties failed to show what offset should be applied to the suspended penalties.

On November 22, 2017, the court granted the People's unopposed request to fix a clerical error in the March 2017 order and identify appellant O'Keefe as one of the persons liable for the suspended penalties.

This appeal followed.

## II. DISCUSSION

### A. Notice Requirements

The Golden Gate Parties do not contend the People's evidence was insufficient to prove violations justifying an award of \$3 million in suspended penalties. Instead, they contend the People were precluded from obtaining suspended penalties because the People did not comply with the notice provision set forth in section C.3.1(a) of the AFJC.

#### 1. Section C.3.1

Section C.3.1(a) requires that, "[i]f the People determine that [the Golden Gate Parties] have violated one or more injunctive provisions, the People shall notify [the Golden Gate Parties] of the violation and request payment of a Suspended Penalty."

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<sup>2</sup> The trial court considered evidence in attorney Pollock's declaration disputing four of the alleged violations, but determined that even if the penalties associated with those violations were deducted, "there would still be far more than \$3,000,000 in suspended penalties to be awarded."

Here, the People notified the Golden Gate Parties of the violation of the AFJC's injunctive provisions and requested payment of a Suspended Penalty. As the Golden Gate Parties acknowledge, in July 2016 Deputy Attorney General Brett Morris informed O'Keefe and Pollock in writing of the violations of the injunctive provisions, and in September 2016 Deputy District Attorney Robert Nichols provided the Golden Gate Parties with a spreadsheet of alleged violations of the AFJC and demanded payment of the suspended penalty amount. As the trial court found, the People satisfied the requirements of section C.3.1(a).

The Golden Gate Parties contend, however, that section C.3.1(a) requires notice of their violation to be sent contemporaneously with the local agency's notice of violation, and pursuant to section K must be provided to attorney Pollock as well as O'Keefe. Their argument is untenable.

As the trial court pointed out, section C.3.1(a) is silent concerning the timing of any required notice. It does not, by its terms, require the People to provide notice to the Golden Gate Parties (or attorney Pollock specifically) contemporaneous with the local agencies' notice of the regulatory violation. (See Civ. Code, §§ 1638, 1639; *AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 821–822 [where the parties have reduced their agreement to writing, their mutual intention is to be determined, if possible, solely from the language of the writing].)

Nor is it reasonable to interpret section C.3.1(a) in the manner appellants suggest. The section requires the People to notify the Golden Gate Parties of the violation “and request payment” of a suspended penalty *if* the People “determine” that the Golden Gate Parties violated “one or more *injunctive provisions*.” (Italics added.) The reasonable inference from this language is not that the People had to give notice contemporaneous with the local agency's observation of a violation of the environmental regulation or code, but that at some point after the People learned of the regulation or code violation, and determined that the Golden Gate Parties had violated the injunctive provisions of the AFJC and suspended penalties were due, the People would inform the Golden Gate Parties about the alleged violation of the *injunctive provision*. This they did.



Other provisions of the AFJC, and the AFJC as a whole, support our construction of section C.3.1. Section C.3.2 required the Golden Gate Parties to pay the suspended penalties within 30 days after the People's notice under section C.3.1(a). The obvious purpose of the notification in section C.3.1(a), therefore, was to advise the Golden Gate Parties of the People's position that there was a violation *of the AFJC* and suspended penalties were owed, and to commence the 30-day period for the Golden Gate Parties to pay those penalties.

Contrary to the Golden Gate Parties' argument, the ostensible point of the notice under section C.3.1(a) was not to inform the Golden Gate Parties (or Pollock) of the violation of the *regulatory laws*. That notice was provided promptly by the local agencies to the Golden Gate Parties' representatives.<sup>3</sup> In fact, AFJC sections F.3.1 and F.3.2 anticipate that the Golden Gate Parties' Environmental Coordinator would collect notices of violation and inspection reports, and report any notice of violation *to* the People. The clear and reasonable implication is that local regulatory agencies (CUPAs) would apprise the Environmental Coordinator of regulatory violations, and the Environmental Coordinator would then report them to the People and, presumably, to any relevant person at the Golden Gate Parties (including O'Keefe and its counsel). Whether the People learned of the regulatory violations from the Environmental Coordinator or from the regulatory agencies, the People would then decide whether there was a violation of the AFJC triggering liability for suspended penalties, notify the Golden Gate Parties of its decision and give the Golden Gate Parties 30 days to pay, and if they failed to do so, enforce the AFJC by noticed motion. Before actually filing a motion for suspended penalties, the People would have to comply with the meet and confer requirement –

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<sup>3</sup> The court found that local agencies notified representatives of the Golden Gate Parties contemporaneously with the discovery of the violations. As the declarations submitted by the People show, each violation cited by the People in its request for suspended penalties was communicated to the Golden Gate Parties by a notice of violation, a copy of the inspection report, or both.

which in this case was commenced by the notification the People provided in July 2016 under section C.3.1.

In short, the AFJC cannot reasonably be interpreted to require the People to provide notice to O’Keefe and Pollock under section C.3.1(a) – or any other provision of the AFJC – contemporaneous with the local regulatory agencies finding or reporting the regulatory violations.

## 2. The Golden Gate Parties’ Arguments

The Golden Gate Parties’ arguments to the contrary are unpersuasive.

### *a. Claim That the Notice’s Purpose was for Pollock to Monitor*

The Golden Gate Parties contend the People had to provide Pollock with notice of the Golden Gate Parties’ violations, contemporaneous to the notices provided to the Golden Gate Parties by local investigatory agencies, so attorney Pollock “could personally monitor future compliance with the terms of the Consent Judgment.”

The language of the AFJC contradicts the Golden Gate Parties’ argument. Nowhere does the AFJC assign to Pollock the task of personally monitoring the Golden Gate Parties’ compliance with the AFJC. To the contrary, the AFJC indicates that the goal of encouraging and monitoring environmental compliance at the Golden Gate Parties’ facilities was served by the requirement in section F.3 that the Golden Gate Parties hire an Environmental Coordinator, whose duties included “collecting and maintaining copies of all written advisements of violation, including Notices of Violation (‘NOVs’) and inspection reports, issued or performed by the CUPAs relating to the Covered Facilities for a period of five (5) years and to undertake good faith efforts to assess [the Golden Gate Parties’] compliance with applicable laws and regulations, and to advise [the Golden Gate Parties’] personnel on compliance with all applicable laws and regulations, and to correct any noted deficiencies or violations.’ ” Furthermore, the Environmental Coordinator was required to submit to the People annual status reports describing the Golden Gate Parties’ compliance program. As Pollock himself admitted in his declaration, the purpose of the Environmental Coordinator was to “monitor and ensure compliance with the laws and regulations cited in the Consent Judgment.”

Remarkably, the Golden Gate Parties now claim it was insufficient to tell its Environmental Coordinator about the regulatory violations, because the Environmental Coordinator had “no duty to inform Mr. O’Keefe or attorney Pollock.” The argument is untenable. As mentioned, the AFJC tasked the Environmental Coordinator to collect notices of violation, correct violations, assess compliance with laws and regulations, and advise personnel on compliance. Whether or not the AFJC explicitly created a “duty” in the Golden Gate Parties’ Environmental Coordinator to tell attorney Pollock – the one they now claim was to personally monitor their compliance with the AFJC – about regulatory violations subjecting the company to millions of dollars in suspended penalties under the AFJC, it was reasonable for the People to anticipate from the AFJC’s language that it would be the Environmental Coordinator’s place to do so.

Moreover, the Golden Gate Parties submitted no evidence that the *parties* intended the People to send notice of the Golden Gate Parties’ environmental violations to Pollock so he could monitor compliance. Although Pollock represented in his declaration that he inserted section C.3.1(a) so he could personally monitor compliance, he did not aver that this intent of *his* was the intent of the Golden Gate Parties, or that this intention was ever expressed to the People. In light of the AFJC’s language and the circumstances of this case, unexpressed subjective intentions would be immaterial to the construction of the AFJC.

#### *b. Accrual of Penalties*

The Golden Gate Parties argue that section C.3.1(a) requires contemporaneous notice to Pollock of his client’s violations because the penalty amounts increase “silently” while the regulatory violations go unabated. They urge that the People should have told their attorney Pollock about their code violations early enough to allow for remediation before the daily penalties commenced.

The argument is utterly meritless. The increases in penalty amounts did not accrue “silently.” They accrued according to the explicit terms of the AFJC, which the Golden Gate Parties signed and then violated, while the Golden Gate Parties failed to remedy the myriad violations of which they indisputably had notice from the local agencies. The

Golden Gate Parties point to no evidence that their failure to remedy the violations was because notice was not sent to Pollock as well as to them.

*c. Meet and Confer*

Section C.3(1)(b) provides: “At least ten (10) days before filing a motion seeking a Suspended Penalty, the People shall seek to meet and confer in good faith with Defendants *to attempt to resolve the matter without judicial intervention.*” (Italics added.) Similarly, section H of the AFJC states: “At least ten (10) calendar days before filing an Enforcement Motion, the People must seek to meet and confer with Defendants *to attempt to resolve the matter without judicial intervention.* To ensure that the meet and confer is as productive as possible, the People will identify, as specifically as the available information allows, the specific instances and dates of non-compliance, *and the actions that the People believe Defendants must take to remedy that non-compliance* and the amount of penalties, if any, sought by the People.” (Italics added.)

The Golden Gate Parties argue that the purpose of the meet-and-confer process was for the Golden Gate Parties to remedy their non-compliance, but the meet-and-confer process did not begin until notice of their potential violations was first given by the People to attorney Pollock in July 2016, long after the purported violations occurred. To the extent the Golden Gate Parties are arguing that the meet and confer process came too late, the AFJC only requires it to occur 10 days before the People file their motion for suspended penalties. Furthermore, the purpose of the meet and confer requirement was not to give the Golden Gate Parties time to remedy their non-compliance, but “to attempt to resolve the matter without judicial intervention.” The requirement that the People share its view of what the Golden Gate Parties needed to do was to flesh out any potential avenue of negotiated resolution without turning to the court; the Golden Gate Parties had already had ample time to remedy their non-compliance in the period since the local agencies notified them of their non-compliance, which, as the Golden Gate Parties admit, was as much as several years.

In sum, the People had no duty under section C.3.1 to inform O’Keefe and Pollock of regulatory violations, or of violations of the AFJC, contemporaneous to the notice that the local agencies provided the Golden Gate Parties of their regulatory violations.

B. Judicial Finding of Golden Gate Parties’ Violations at the Hearing

The Golden Gate Parties point out that, before the court may require them to pay a suspended penalty, the court must find under section C.3.1(c) that “one or more Defendants have engaged in a violation on one or more occasions.” From this, the Golden Gate Parties make two arguments: (1) the court did not find any violation, and (2) to find a violation, the court had to conduct an evidentiary hearing in the nature of a contempt hearing. Both arguments are untenable.

1. Violation

The Golden Gate Parties argue: “One may search high and low in the Reporter’s Transcript and in the Order for any ‘finding’ of a violation.” That the court found violations of the AFJC, however, is obvious.

The judge was plainly aware of the terms of the AFJC – which was not only presented to the court in briefing but also a document that the judge himself had signed – including the AFJC’s unremarkable requirement that suspended penalties be imposed only if the court found a violation of the AFJC. In its order imposing the penalties, the court stated that “in ruling on the Motion, the Court must evaluate the evidence supporting and opposing the imposition of suspended penalties and make a determination as to what suspended penalties, if any, to award.” The People’s evidence supporting the imposition of suspended penalties provided overwhelming documentary proof of the Golden Gate Parties’ violations, and the court observed that O’Keefe’s declaration did not “affirmatively rebut any of the evidence adduced by the People in support of the imposition of suspended penalties or otherwise provide the Court any independent basis to conclude that the *alleged violations* did not occur.” (Italics added.) As to four matters raised in Pollock’s declaration, the court ruled that an inspection report “*substantiates the alleged violations*” at the North Cloverdale Facility and the court would “award the appropriate penalties relative to the *violations* noted in the May 6, 2014 inspection.”

(Italics added.) The court then explained that even if it were to deduct the value of “all of the violations contested by Defendants,” there would “still be far more than \$3,000,000 in suspended penalties to be awarded,” and so granted the People’s request. From all of this, it is reasonable to surmise that the trial judge concluded that the People *had* established the alleged violations sufficient to impose the full amount of the Suspended Penalty. Certainly that inference is more logical than the Golden Gate Parties’ proposition, which would have us believe that the judge chose to ignore the terms of the AFJC and willy-nilly impose penalties without figuring out if any violation had ever occurred.

## 2. Nature of Proceeding

Under section H of the AFJC, the People could enforce the terms of the AFJC by a contempt proceeding (see section F.1.1) *or* by an alternative process outlined in section C.3 for suspended penalties. A contempt proceeding for violation of the AFJC would have required proof beyond a reasonable doubt and subject defendants to a possible fine not exceeding \$1,000 or imprisonment not exceeding five days, or both. (Code Civ. Proc., § 1218, subd. (a).) The People did not take that route, opting instead for the section C.3 proceeding to recover suspended penalties.

The Golden Gate Parties nonetheless argue that, whether the People pursued “by way of a contempt motion itself or by way of a motion to enforce the AFJC,” the court would have to “find[] a violation of its AFJC (which is contempt).” Thus, they urge, the hearing should have been in the “nature” of a contempt proceeding, with proof beyond a reasonable doubt and an evidentiary hearing. They cite no supporting legal authority for their argument, and the AFJC cannot be so read.

The AFJC provides that enforcement for “penalties as provided for in Section C.3” would be pursued by motion under Code of Civil Procedure section 1005, which refers to “*papers*” filed in support of and opposition to a noticed motion. Furthermore, rule 3.1306(a) of the California Rules of Court specifies that “[e]vidence received at a law and motion hearing must be by declaration or request for judicial notice *without testimony or cross-examination*,” unless the court orders otherwise for good cause after the party

seeking to introduce oral evidence has filed a written statement describing the proposed evidence. (Rule 3.1306(a), (b); *Italics added.*) The Golden Gate parties did not file a statement under 3.1306(a) or demonstrate that oral evidence or cross-examination was necessary.

The Golden Gate Parties argue that a “confrontational hearing with each of the declarants” would have “allowed defendant’s employees to attempt to gather together evidence” on the alleged violations, and “there was little time otherwise to put such facts in declarations.” The argument is unpersuasive. It is unclear how a “confrontational” hearing would have given the Golden Gate Parties’ employees more time to attempt to gather evidence. It is also unclear why they would need more time: they were notified of the alleged violations by the local agencies in the regular course of the inspections; they knew by July 2016 – five months before the People filed their enforcement motion – that the People were intending to enforce the AFJC for potential violations; and if they had any evidence to rebut the alleged violations, it would have been in their possession. At any rate, the Golden Gate Parties never sought an extension of the hearing date to produce evidence, and even now do not identify any evidence they might have presented that would have made any difference in the outcome.

In their reply brief, the Golden Gate Parties urge that adjudication of the violations should not have been made “solely upon the People’s unchallenged declarations” because sections C.3.1(b) and H.1 contemplate that the defendants may oppose an enforcement motion on the grounds that the alleged violation did not occur. The fact that the Golden Gate Parties could *dispute* the alleged violation does not mean they had the right to cross-examine witnesses, and they present no legal authority to support their argument.

D. O’Keefe is Personally Liable for the Full Amount of the Suspended Penalties

The Golden Gate Parties urge that O’Keefe is not personally liable for the suspended penalties because his name does not appear in the caption of the “Order Granting Motion to Enforce Amended Final Judgment on Consent and Assess Suspended Penalty” (Order) or as a liable defendant in the text of the Order.

The argument is specious. It ignores the court's order of November 22, 2017, which corrected the Order to make clear that the suspended penalties *were* awarded against O'Keefe as an individual. That order was granted after Pollock, as O'Keefe's attorney, advised that they did not oppose the People's request to make this correction.<sup>4</sup>

The Golden Gate Parties further argue that O'Keefe was not personally served with a copy of the AFJC or notice of its entry. However, they provide no competent evidence that O'Keefe was not provided with a copy of the AFJC or unaware of the AFJC's requirements. As the Golden Gate Parties admit, the AFJC was "Electronically Filed," and electronic filing provides for service on O'Keefe's attorney.

Lastly, the Golden Gate Parties argue that the Order is not valid against O'Keefe because the court did not conduct a proportionality analysis weighing "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728 [pertaining to the excessive fines clause of the Eighth Amendment].) This argument cannot be asserted now, because it was not made in the trial court. (*City of San Diego v. D.R. Horton San Diego Holding Company, Inc.* (2005) 126 Cal.App.4th 668, 685.) Moreover, the AFJC expressly provides that the civil penalties under the AFJC are imposed on all of the Golden Gate Parties, jointly and severally, and the Golden Gate Parties, "and each of them, are jointly and severally liable for all payments required pursuant to this Judgment."

The Golden Gate Parties fail to demonstrate error.

### III. DISPOSITION

The order is affirmed.

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<sup>4</sup> We note that Pollock was served with notice of the entry of the November 2017 order before the Golden Gate Parties filed their opening brief in this appeal, yet they still advanced their argument based on the March 2017 Order. Even after the People pointed out the November 2017 order in the respondent's brief, the Golden Gate Parties continued to rely on their argument in their reply brief.



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NEEDHAM, J.

We concur.

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JONES, P.J.

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SIMONS, J.

(A151075)